IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JAMES WHITEHEAD and
JOHN GARTMAN, PLAINTIFFS,

VERSUS CIVIL ACTION NO. 1:93CV315-S-D

KERR-MCGEE CHEMICAL
CORPORATION, INC., DEFENDANT.

MEMORANDUM OPINION GRANTING
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause is before the court on the motion of the defendant for summary judgment of the plaintiffs' claims. Issued concurrently with this memorandum opinion is the court's memorandum opinion finding that the plaintiffs are collaterally estopped from disputing that they falsified their time sheets. The partial summary judgment only dismissed one of the plaintiffs' defamation claims. This opinion dismisses the remainder of the plaintiffs' claims.

Summary Judgment Standard

The summary judgment standard is familiar and well settled. Summary judgment is appropriate only if the record reveals that there is no genuine issue of any material fact, and the moving party is entitled to judgment as a matter of law. F.R.C.P. 56(c). The pleadings, depositions, admissions, answers to interrogatories, together with any affidavits, must demonstrate that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is

no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Federal Sav. and Loan Ins. V. Kralj, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the nonmoving party. Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986). However, summary judgment is mandated after adequate discovery and upon proper motion against a party who fails to make a sufficient showing to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322.

Facts

Since the court has recited the undisputed facts in a memorandum opinion addressing the defendant's motion for partial summary judgment, it is unnecessary to repeat them here. If any additional facts are necessary they will be incorporated in to the legal discussion.

Discussion

In appears that the plaintiffs have conceded in their response to the motion for summary judgment several of their initial defamation claims. The plaintiffs contend that there is a material issue of fact whether they were first, defamed by the statement of Dean Minga before the MESC that the plaintiffs were the only employees to have falsified time sheets, and second, that Bill Herrington had stated that the plaintiffs had threatened certain employees of the defendant.[1] Additionally, the plaintiff maintain

[1] The plaintiffs also claim that there is a genuine issue of fact as to the posting of the termination letters. This claim of defamation was dismissed with prejudice pursuant to the

that they have a viable breach of employment contract claim. The defendants disputes all of the plaintiffs' assertions. Specifically, the defendants argue that this court lacks jurisdiction over the plaintiffs' claims by the Garmon preemption doctrine, since the case is centered around alleged unfair labor practices which can only be heard by the National Labor Relations Board (NLRB). Alternatively, the defendants argue that the alleged defamatory statements are protected by statutory immunity and/or common law immunity. Finally, the defendants contend that there can not be a breach of contract claim because the plaintiffs were at-will employees.

Garmon Preemption

The defendants munipulate the defamation and breach of contract claims to argue that the plaintiffs actually are alleging that the basis of the defendants actions was in retaliation for the plaintiffs' pro-union activities. This would then be a violation of 29 U.S.C. §§ 157 and 158(a)(1) and (3), thus controled by the National Labor Relations Board.

> When it is clear or may fairly be assumed that the acivities which a State purports to regulate are protected by Section 7 [29 U.S.C. § 157] of the National Labor Relations Act or constitute an unfair labor

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defendants' motion for partial summary judgment. Those defamation claims which the plaintiffs did not designate as having raised a question of fact, the court believes were as a matter of law without merit. The affidavit of Billy Pruett unrefutably establishes that he was not told by Herrington that Whitehead had stated that Pruett drank on the job. Lastly, the deposition of Danny Flippo proves that Herrington had not said to Flippo that Whitehead had threatened Herrington with a gun. If the plaintiffs did not intend to concede these defamation claims, then alternatively, the court finds there to be no genuine issue of material fact, and that as a matter of law they are dismissed with prejudice.

> practice under Section 8 [29 U.S.C. § 158], due regard for the federal enactment requires that state jurisdiction must yield.

San diego Bldg. Trades Council, et al. v. Garmon, 359 U.S. 236, 244-46 (1959). "The Court has permitted exceptions to Garmon preemption when the state or federal court wil decide issues 'that do no threaten significant interference with the NLRB's jurisdiction.'" Hobbs v. Hawkins, 968 F.2d 471, 476 (5th Cir. 1992) (quoting Windfield v. Groen Div., Dover Corp., 890 F.2d 764, 767 (5th Cir. 1989)). "These exceptions derive from Gramon itself, which excluded form its preemption mandate conduct that is a mere 'peripheral concern' of federal labor law or that touches 'deeply rooted' local interests." Hobbs, 968 F.2d at 476.

The test for determining whether the claims are preempted was clearly stated by the United States Supreme Court in Local 926 International Union of Operating Engineers v. Jones, 460 U.S. 669 (1983).

> First, we determine whether the conduct that the state seeks to regulate or to make the basis of liability is actually or arguably prohibited or protected by the NLRA. Although the "Garmon quidelines [are not to be applied] in a literal, mechanical fashion," if the conduct at issue is arguably prohibited or protected, otherwise applicable state law and proceedings are ordinarily pre-empted. When, however, the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling or responsibility that, in the absence of compelling Congressional directive, it cannot be inferred that Congress intended to deprive the state of the power to act, we refuse to invalidate state regulations or sanction of the conduct.

Id. 460 U.S. at 676 (internal citations omitted). Once the conduct is determined to be "arguably prohibited by the NLRB", the focus of the review is on the second prong of the test. The United States Supreme Court in Sears, Roebuch & Co. v. Carpenters, 436 U.S. 180

(1978), refined the analytical framework of the second prong.

> [t]he critical inquiry, therefore, is not whether the State is is enforcing a law relating specificaly to labor relations or one of general application but whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the Garmon doctrine was designed to avoid.

Id. 436 U.S. at 197 (internal paranthetical phrases omitted). The determination of potential risk of interference by any tribunal other upon jurisdiction exclusively designated to the NLRB requires "a more searching comparison than merely the factual bases of each controversy." Windfield, 890 F.2d 768. "The broader inquiry into the controversies would involve an examination of the interests protected by and relief requested for each claim." Id. 890 F.2d at 768.

Defamation and breach of contract claims are matters routinely before this court. Although these claims can come within the exclusive jurisdiction of the NLRB, in this case they are strictly peripheral to its inquiry. The NLRB has previously conducted an inquiry involving the factual circumstances of the firing of the plaintiffs, and concluded that it was not related to their union activity. In Linn v. United Plant Guard Workers, 383 U.S. 53 (1966), the Supreme Court concluded:

> where either party to a labor dispute circulates false and defamatory statements during a union organizing compaign, the court does have jurisdiction to apply state remedies if the complainant pleads and proves that the statements were made with malice and injured him.

Id. 383 U.S. at 55. The defamation and breach of contract claims

did not even arise during the union organizing. Additionally, the issues and claims before this court are different from the NLRB's inquiry. The allegation that the defendants discharged the plaintiffs in retaliation for their union activities has been dropped by the plaintiffs, and the defendants emphasizing it does not rejuvenate the position. Again, the NLRB has conducted an inquiry and found no violation of the NLRA. Accordingly, this court's jurisdiction over the plaintiffs' claims does not interfer with the jurisdiction of the NLRB.

Minga's Testimony Before MESC

One of the surviving claims of defamation made by the plaintiffs centers on the testimony of Dean Minga, a maintenance supervisor for defendant, before the MESC. In response to question by Danny Flippo, union representative, the specific testimony was:

> Q. You're saying that there has never been an occasion that you can recall to where a time sheet has been changed, in other words, somebody come up and argue about a time sheet or whatever, disagree with it, the supervisor had done signed it and went in, and then anouther employee come up and argue about it and then change it, to your knowledge, that hasn't happened?
>
> A. In fact, I don't ever get involved in the time sheets.
>
> Q. To your knowledge, has anybody ever gotten paid for time that they didn't work?
>
> A. Well, no, because like I say, I don't know exactly what time a guy comes and what time he leaves, other than the records that, you know, I have looked at pertaining to these two guys.

Transcript of MESC proceedings, pp. 116-117. The plaintiffs content that Minga falsely testified that they were the only employees to draw pay for hours not worked in order to prevent them from receiving drawing unemployment benefits. Beside this being an

extreme extrapolation of Minga's testimony, the court does not understand how such a statement defames the plaintiffs. It is not necessary for the court to decipher the plaintiffs' claim, since Minga's testimony before the MESC is qualifiedly immuned by § 71-5-131 (1989) Mississippi Code Anotated. The statutory immunity provides:

> All letters, rports, communications or any other matters, either oral or written, form the employer or employee to each other or to the Commission or an of its agents, representatives, or employees, which shall have been written, sent, dilivered, or made in connection with the requirements and administration of this chapter shall be **absolutely privileged** and shall not be made the subject matter or basis of any suit for slander or liel in any court of the State of Mississippi unless the same be false in fact and maliciously written, sent, delivered, or made for the purpose of causing a denial of benefits under this chapter.

This court held in Davis v. CECO Bldg. Systems, 813 F.Supp. 1202 (N.D. Miss. 1993), stated:

> Under Mississippi state law, communications between an employer and the MESC are absolutely privileged unless false in fact and maliciously made for the purpose of d

Breach of Employment Contract

The plaintiffs content that the employee handbook forms a contract of employment which provided that the plaintiffs could not be discharged except for cause. Previously, the Hamilton plant was a union shop controled by a collective bargaining agreement which provided that an employee could only be fired for cause. When the Hamilton plant was decertified, and the employee handbook was distributed, the plaintiffs contend that it was represented to them that nothing had changed in repect to the discharge policy. Of

course, the court has found that the plaintiffs are collaterally estopped from disputing that they did not falsify their time sheets. Thus, it is undisputed that the plaintiffs were discharged for cause. Additionally, the employee handbook specifically provides:

> This handbook should not be considered as a contract for employment. Any employee may voluntarily leave the company. Likewise, the Company retains the right to discharge employees or reduce manpower levels. Any oral or written statements or promises to the contrary are hereby disavowed. This handbook is also subject to revision from time to time.

Kerr Mcgee Employee Handbook, Hamilton Pigment Plant, p. 2.

It is an established common law rule in Mississippi that "where there is no employment contract (or where there is a contract which does not specify the term of the worker's employment), the relation[ship] may be terminated at will by either party." Perry v. Sears Roebuck, & Co., 508 So.2d 1086, 1088 (Miss. 1987). Mississippi has followed this rule since 1858. See Butler v. Smith & Tharpe, 35 Miss. (6 Geo.) 457, 464 (1858). The Mississippi Supreme Court explained the employment at will doctrine as follows:

> The employee can quit at will; the employer can terminate at will. This means that either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract.

Kelly v. Mississippi Valley Gas Co., 397 So.2d 874, 874-75 (Miss. 1981); but see Shaw v. Burchfield, 481 So.2d 247, 253-54 (Miss. 1985) ("Were this a case where no employment contract established expressly the ground rules for termination and where the employer was calling upon the state to furnish the law which authorized termination, we might well be charged to reconsider the at will

termination rule."); Perry v. Sears, Roebuck & Co., 508 So.2d 1086, 1087 (Miss. 1987) ("This is not the first time we have taken note of corporate callousness towards loyal workers"); Bobbitt v. The Orchard, Ltd., 603 So.2d 356, 361 (Miss. 1992).

"Employment of an agent for an indefinite time is terminable at will under Mississippi law." Solomon v. Walgreen Co., 975 F.2d 1086, 1090 (5th Cir. 1992) (citing Butler, 35 Miss. at 464). "Without a written confirmation of length of employment, [an individual] remain[s] an employee at will subject to dismissal for a good reason, a wrong reason, or no reason at all." Solomon, 975 F.2d at 1090. The Mississippi Supreme Court has held "that a personnel manual 'can create contractual obligations, even in the absence of a written agreement." Bobbitt, 603 So.2d at 361 (quoting Perry, 508 So.2d at 1088). "The [United States] Supreme Court has recognized that a state institution may, through its policies, give rise to a state law implied contractual right based on 'mutually explicit understandings.'" Wells v. Hico Indep. Sch. Dist., 736 F.2d 243, 252 (5th Cir. 1984) (quoting Perry v. Sindermann, 408 U.S. 593, 601 (1972)).

> A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient "cause" is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that a teacher has a "property" interest in re-employment. For example, the law of contracts in most, if not all, jurisdictions long has employed a process by which agreements, though not formalized in writing, may be "implied." Explicit contractual provisions may be supplemented by other agreements implied from "the promisor's words and conduct in the light of surrounding circumstances."

Perry v. Sindermann, 408 U.S. 593, 601-02 (1972) (internal

citations omitted). The Mississippi Supreme Court has held that express statements in employee handbooks which disavow that the contents create a legal contract or alters an at-will status will bar the argument that the employee is not at-will. See Hartle v. Packard Electric, 626 So.2d 106, 109 (Miss. 1993).